No. 4061

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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In re Delinquent Tax Roll—City of Ketchikan (a municipal corporation),

*Appellant,*

vs.

Mary M. Furnivall, Objector,

*Appellee.*

## BRIEF FOR APPELLANT

**Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.**

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### Statement.

This is the appeal of the City of Ketchikan, Alaska, from a decree of the District Court of Alaska, Division No. 1, refusing to issue an order for the sale of certain property for failure to pay a street grade assessment, dismissing the proceedings and taxing costs against said city; and arises as follows:

**Section 627, Compiled Laws of Alaska (1913) provides that the common councils of Alaska municipalities "shall have and exercise the following powers:**

* * * Fourth to provide for the location, construction and maintenance of the necessary streets, al-

leys, crossings, sidewalks, sewers and wharves. *If* such street alley, sidewalk or sewer or parts thereof is located and constructed upon the petition of the *owners of two thirds* in value of the property abutting upon and affected by such improvement, *then two thirds of the cost of the same may, in the discretion of the council be collected by the assessment and levy of a tax against the abutting property and such tax shall be a lien upon the same and may be collected as other real estate taxes are collected.* (Italics ours.)

**Chapter 69, p. 257 of the Session Laws of Alaska (1913) provides a way for the collection of other real estate taxes, viz:**

*Section* 7. The delinquent tax roll is to be presented in Court for adjustment and order of sale.

*Section* 8. Thereupon it (the Court) shall "hear, pass upon and determine" the legality of said roll.

*Section* 9. Any "person owning or having any legal or equitable interest in or a lien upon any tract listed in said duplicate assessment roll, may appear and present at the time of hearing before the Court his objection to, and contest, the validity of the assessment or tax on such property or the granting of the order of sale thereof. *Such objection shall be in writing and specify the grounds of objection to the assessment or tax on the particular tract represented in such objection* and the Court will hear and determine *such objection* and render such decision *thereon* as may be legal and just. At such

hearing *the duplicate tax roll shall be prima facie evidence of the regularity and legality of the assessment and levy of the tax and that the same is unpaid,* and *no objection to the valuation of the property, the manner of the assessment and levy* of the tax, or any of the subsequent proceedings shall be *entertained by the Court which does not affect the substantial rights of the party interposing the objection.* If at such hearing the Court shall find any tract to be overvalued *or overassessed, the same shall be adjusted on equitable principles* so that the same shall bear its just proportion to the levy" etc.

*Section* 11. "The Clerk of the Town shall immediately correct the original delinquent tax roll to correspond in all respects with the delinquent roll as passed upon and allowed by the Court" etc., etc. (Italics ours.)

On May 20, 1922, The City of Ketchikan duly filed in said Court its delinquent tax roll and asked for an order of foreclosure and sale of divers and sundry lots and blocks, and among these were lots 11, Block E, and Lots 1 and 3, Block 3, S. Addition, which had been assessed to one F. J. Furnivall and were alleged to be delinquent in payment of the local assessment for the Harris Street Extension improvement. (Tr. p. 36.)

In due time Mary M. Furnivall (appellee herein), wife of said F. J. Furnivall, filed in said Court written objections in which she claimed to

be the owner of said lots (except as against the U. S.) and objected to the issuance of any order of sale of said lots. (Tr. pp. 1-22.) Her paper entitled *"Objection"* occupies 22 pages of the printed record, but we think, and so assert, that the objections are set out in paragraphs VIII, IX, XIV, XV, (Tr. pp. 8-9-15)—the remaining portion of said 22 pages being taken up with recitals most of which are irrelevant, and with exhibits, repetitions and generalities. The objections are:

(1) That no petition or request or other authority had ever at any time or place been presented to the said City Council of Ketchikan, aforesaid, signed or endorsed by a majority of the property owners, etc. (Par. VIII, Tr. p. 8.)

(2) That the objector, Mary M. Furnivall, did not sign any such petition but that on the contrary she objected to the improvement. (Par. VIII, Tr. p. 8.)

(3) That the property of the Ketchikan Consolidated Mines Company, an alleged abutter, was not assessed. (Par. IX, Tr. p. 9.)

(4) That objector's said lots are unpatented and the ultimate title is in the United States. (Par. XV, Tr. p. 15.)

(5) That all of said assessments and proceedings of the said City of Ketchikan and its officials are void and in violation of law. (Par. XIV, Tr. p. 15.)

The matter came on to be heard by the Court without a jury; whereupon the City duly presented its delinquent roll as provided by law and asked for judgment of foreclosure and order of sale. The objector then offered some testimony in support of her objections.

At the conclusion of the testimony offered by the objector the City moved, in substance and effect, that the order issue as prayed for because the said objections had not been made out. The motion was denied and the City excepted. The City introduced no further evidence.

The Court took the matter under advisement and later made

**Findings.**

as follows (Tr. p. 87 et seq.):

> "1. That Mary M. Furnivall, at the time of filing in this Court of the delinquent tax roll of the City of Ketchikan for that certain street improvement known as Harris street extension in said Ketchikan, was entitled to the possessory title to lots No. 1 and 3 in block No. 3, Townsite Addition to the City of Ketchikan, Alaska; that said Mary M. Furnivall is the owner of lot 11 in block E, Schoenbar Addition to the City of Ketchikan, Alaska.
>
> 2. That at all the times mentioned in the objection filed herein by Mary M. Furnivall, and the said delinquent tax roll of the City of Ketchikan, Alaska, and in the proceedings before its City Council in relation to the extension of the said Harris street, upon which the claim of tax in said delinquent tax roll is made by said City of Ketchikan, Alaska, against said property of this objector, the City

of Ketchikan was an incorporated town or city, within the Territory of Alaska.

3. That on September 7, 1920, certain property owners and others, residents of Ketchikan, presented to the City Council of Ketchikan aforesaid, a petition in writing, asking for the construction of an extension of the said Harris street at the expense of the property owners thereon, and the City of Ketchikan; that on October 5, 1920, certain property owners and others, residents of Ketchikan, presented to the City Council of Ketchikan, aforesaid a petition in writing asking for the construction of an extension of the said Harris street at the expense of the property owners thereon, and the City of Ketchikan; and that Mary M. Furnivall, objector herein, was not a party to either of said petitions, or any other document or agreement authorizing or creating a lien, or otherwise permitting the creation of a lien upon her property.

4. That prior to the completion of the improvement of the Harris Street extension, no action was taken by the City Council of the City of Ketchikan, Alaska, as provided by law, authorizing the improvement of such street or assessing the cost of such improvement against the property owners thereon or against the property abutting thereon; no notice was served upon this objector of any proposed improvement of such street; no finding that the owners of two-thirds in value of the property whose property abuts the improvement on said Harris street extension had petitioned the City Council of the City of Ketchikan therefor was ever made by said City Council; no ordinance or resolution to construct or improve said street and assess the abutting owners for two-thirds the cost thereof, or any other portion of such cost, was ever made or passed by said Council

in connection with the improvement of said Harris street extension.

5. That the only action of record taken by the City Council of the City of Ketchikan in the matter of the improvement of Harris street extension as aforesaid, was the adoption at a regular meeting of said council on December 21, 1921, of an assessment against the property abutting on said improvement for the cost of the improvement thereon, and the later publication of an application to this Court for an order of sale of the property so assessed on which the tax had not been paid."

And afterwards the Court entered judgment sustaining the objections made by said objector, denying the prayer for order of sale and adjudging costs against the City. The latter appeals.

**Assignments of Error.**

(Tr. p. 123)

These are numerous and voluminous —too much so; but they are designed to present, and do, we think, present the following questions, viz:

Was it error to deny the motion of the City of Ketchikan made at the conclusion of the evidence?

Was it error to sustain the objections made?

Was it error to decide the case on objections not made?

Was it error to refuse to issue an order of sale, and to render judgment against the City of Ketchikan?

## POINTS, ARGUMENT AND AUTHORITIES.

### I.

It was error to deny the motion of the City of Ketchikan made at the conclusion of the evidence on behalf of the objector. This motion, although inartifically expressed, was in substance and effect that the Court overrule the objections and grant the order of sale as prayed for. (Tr. pp. 84-5.)

The only objections the City was called on to meet were the written objections.

We will consider said objections in their numerical order as hereinbefore designated.

#### Objection No. 1.

"That no petition or request or other authority had ever at any time or place been presented to the City Council of Ketchikan aforesaid signed or endorsed by a majority of the property owners, abutters, etc."

The statute makes the production of the assessment roll prima facie evidence of the regularity of the proceedings. The burden was on the objector to rebut this presumption and not on the City to "bolster up" the roll in the first place.

Town of Ketchikan v. Zimmerman, 4 Alaska 336;

2 page and Jones on Taxation by Assessment, Sec. 1282—Cases in Note 4.

However, it was *alleged* in the "objections" that a petition was presented to the Council *purporting*

to be signed by the requisite number of property owners (Par. IV, Tr. p. 3, Tr. p. 18); and it was *proved* (by the objector) that said petition was approved, bids called for and received and the work ordered to be done, and that said work was done, and paid for by the City and an assessment made. (Tr. pp. 62-3-4.)

The objector produced *no* evidence tending to show that the petition was *not* adequately signed.

Therefore objection No. 1 was not sustained by any evidence.

**Objection No. 2.**

"That the objector Mary M. Furnivall did not sign any such petition but on the contrary she objected to the improvement."

There was evidence to that effect, but the fact itself is absolutely immaterial; for the objection is not a valid one. It was not required that the petition be unanimous.

Therefore this objection avails naught.

**Objection No. 3.**

That the property of the Mines Company was not assessed.

If the Mines Company's property was not benefited it could not be assessed.

Norwood v. Baker, 172 U. S. 269; 43 L. Ed. 443;

5 McQuillan Mun. Corp., Sec. 2043, p. 4377 et seq., also Sec. 2018, p. 4329 et seq.

It is presumed prima facie that if any property was omitted it was properly omitted.

2 Page and Jones Taxation by Assessment, Secs. 1282, 1298.

Here again, under the statute, the burden was on the objector to show that the Mines Company's land was *improperly omitted*—i. e., that it was benefited.

1 Page and Jones Taxation by Assessment, Sec. 643, p. 1099.

This burden she totally failed to sustain—she introduced no evidence whatsoever on that score. On the contrary whatever evidence there was on the subject tended to show that the Mines Company's land was property omitted. (Tr. p. 81 bottom, p. 82 bottom).

Not only did the objector not introduce any evidence of benefit to the Mines Company's land, she did not even allege such benefit.

Therefore this objection "goes by the board".

**Objection No. 4.**

That the ultimate title to objector's said lots is in the United States.

This certainly is no valid objection to general taxation or taxation by local assessment, if objector was in possession,—had a possessory title.

Mackey v. Choctaw, 261 Fed. 342;

5 McQuillan on Mun. Corp., Sec. 2043, p. 4382.

Objector alleges that she is the owner of the possessory rights in the lots (Tr. p. 1, Par. 1) and she proved that she had the possession and possessory title of said lots. (Tr. pp. 40-42-45.)

Sec. 16, Ch. 69, Session Laws Alaska 1913, p. 269.

**Objection No. 5.**

"That all of said assessments and proceedings of said City of Ketchikan and its officials are void and in violation of law."

This is simply a general statement—a conclusion of law; no facts are alleged—it raises no issue at all and cannot be considered.

2 Page and Jones, Sec. 917;

Northern Indiana Land Company v. Tyler, 84 N. E. 828 (Ind.)

Therefore this objection follows its brethren.

Thus all the objections which the City was called on to meet are disposed of and it is difficult to see any ground for denying the motion.

As the evidence was being introduced it could not be said that the evidence would have no tendency to support some one or more of the written objections; but when it eventuated (as it did eventuate when the evidence was closed) that not a single valid objection had been sustained by the evidence, the motion was made. The objector did not ask to amend. She was content to rest on her written objections; all other objections are thereby waived.

## II.

### THE FINDINGS DO NOT SUSTAIN ANY MATERIAL OBJECTION MADE.

The only objection *made and sustained* was the objection that "Mary M. Furnivall, objector herein was not a party to either of said petitions or any other document or agreement authorizing or creating a lien or otherwise permitting the creation of a lien upon her property".

As before said, while this is true, yet it is unimportant—absolutely immaterial.

*As no material objection made was sustained* the decree should have been for the City of Ketchikan.

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## III.

### ALL OTHER FINDINGS WHICH ARE ADVERSE TO THE CITY ARE (1) OUTSIDE THE ISSUES, AND (2) ARE EITHER NOT BASED ON THE EVIDENCE OR LACK OF EVIDENCE, (3) OR ARE IMMATERIAL.

To amplify.

**Finding No. 4.**

(Tr. p. 89):

(a) "That prior to the completion of the improvement of the Harris Street extension no action was taken by the City Council of the City of Ketchikan, Alaska, as provided by law, authorizing the improvement of such street or assessing the cost of such improvement against the property owners thereon or against the property abutting thereon."

(1) No such objection as this was made.

The only issues in the case are those made by the written objections.

This is a special statutory proceeding—not in the course of the common law. The Court has jurisdiction to consider those objections only which were made by the "written objections" on file. The statute provides that "such objections shall be in writing and specify the grounds of objection" and the Court will hear and determine "such objections" and render such judgment *thereon* as may be legal and just. No amendment was asked for or made—indeed the statute does not provide for amendments.

The scope of the inquiry is determined by the terms of the statute.

28 Cyc. p. 1180 (VII).

The findings must be within the issues.

City of Spokane v. Curtis, 120 pp. 70-2, Co. p. 72 (4).

Objections not presented as required are waived.

2 Page and Jones on Taxation by Assessment, Sec. 918/01558—Note 11.

XXV Am. & Eng. Encyc. p. 1225—and cases cited;

28 Cyc. p. 1174, Note d.

(2) There is no evidence that "no action, etc., was taken." The presumption is that the necessary action was taken. The evidence shows that a peti-

tion purporting to contain the requisite number of signatures was filed and approved, bids called for and received, and the work ordered done and the assessment made. (Tr. p. 63-64).

As to there not having been, *prior to completion* of the improvement, any action "assessing the cost of such improvement against the property owners thereon or against the property abutting thereon," it is sufficient to say that the statute does not require such action to be taken or forecasted *prior* to the improvement.

(b) "No notice was served upon this objector of any proposed improvement of such street".

(1) No such objection was made by the objector.

(2) It is immaterial whether or not any such notice was served. The statute does not require such notice to be given or served.

Parsons v. City of Grand Rapids, 104 N. W. 730-733, 2nd. Col. (Mich.)

D. C. v. Burgdorf, 6 D. C. Appeals 465.

Before the assessment became effectual—i. e., before the property could be sold—the owner of the property had notice, had her day in court. This is sufficient notice.

Davidson v. The Board, 96 U. S. 97; 24 L. Ed. 616;

Walston v. Nevin, 128 U. S. 578, 32 L. Ed 544;

Caldwell v. Village of Carthage, 31 N. E. 602 (Ohio).

The object of notice is to enable the proper owner to protect his rights. If he appear in the case the object of notice has been accomplished and he will not be heard to complain on that ground.

Barker v. Omaha, 16 Nebr. 269-271, 20 N. W. 382. Citing many cases.

(c) "*No finding* that the owners of two thirds in value of the property whose property abuts the improvement on said Harris Street extension had petitioned the City Council of the City of Ketchikan therefor *was ever made by said City Council* (Idem).

(1) No such objection is among the objections made by the objector.

(2) No such finding is required to be made *by the City Council.*

(3) The uncontradicted evidence shows that the petition was *approved.* (Tr. p. 63). This is a finding that the petition was sufficient.

(d) "No ordinance or resolution to construct or improve said street and assess the abutting owners for two thirds the cost thereof, or any other portion of such cost, was ever made or passed by said Council in connection with the improvement of said Harris Street extension".

(1) No such objection is among those made by the objector.

(2) No *Ordinance* is necessary, for it is provided in Section 628, C. L. A. (1913) that the Coun-

cil may exercise their powers by Ordinance *or* Resolution.

When the petition was presented the Council approved it and ordered it placed on file and directed that bids be called for (Tr. p. 63); bids were received, the contract let, the work done and paid for (Tr. p. 64) and the Council made the assessment by a *resolution* (Tr. p. 66).

**Finding No. 5.**

(Tr. p. 89).

"That the only action of record taken by the City Council of the City of Ketchikan in the matter of the improvement of Harris Street extension as aforesaid was the adoption at a regular meeting of said Council on December 19, 1921, of an assessment against the property abutting on said improvement for the cost of the improvement thereon and the later publication of an application to this Court for an order of sale of the property so assessed on which the tax had not been paid".

(1) No such objection is among those made by the objector.

(2) The uncontradicted evidence is that the things mentioned in this finding are not the "only action" of record taken by the City Council in the matter of the improvement of Harris Street Extension". On the contrary Mr. Winston (objector's witness) read from the minutes, (Tr. p. 63) as follows:

"The amended petition on Harris Street was read and on motion by Councilman Paup, seconded by Councilman Morrison, the same was approved and ordered placed on file.

The motion carried. A motion was regularly made and carried that bids be called for on the work on Harris Street to be in by the next regular meeting, by the City Clerk".

Bids were called for; about half a dozen bids were received and the contract was let and the improvement was constructed under the contract at a cost of $4,958.80, all of which was paid by the City. (Tr. p. 63). On being asked if he had read all the minutes in regard to ordering the work, Winston replied:

*"No, I don't think I have. I think it would take more than an hour to read all the minutes with respect to the orders given on that work."* (Tr. p. 64).

Whereupon counsel rested on his laurels; but this is very far from being sufficient to sustain a finding that the records are as meagre as the Finding would have them. One would judge from the Finding that there was no record that a petition had been received and approved, or that the work was ordered done, or that the work was done or paid for; whereas the uncontradicted testimony shows that all said things were done.

**To Recapitulate:**

(I) The objections *made* were insufficient in law.

(II) There was no evidence to sustain any *material objection made.*

(III) The findings sustain *no material objection made.*

(IV) The material findings *made* (Findings Nos. 4 & 5) are outside the issues.

(V) The material findings made (Findings Nos. 4 & 5) are not supported by the evidence.

The decree then has no valid support and must fall.

Dated, September 15, 1923.

Respectfully submitted,

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